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February 12, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 8, 2005

Case Number: TSO-0227

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to possess an access authorization under the Department of Energy (DOE) regulations entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."^{1/} Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.^{2/} After reviewing the evidence before me, I find the Individual's access authorization should be granted.

I. Background

The Individual was hired by the DOE in 2001 as a postdoctoral research fellow. He applied for his access authorization in August 2002. The background investigation conducted as a result of his application for an access authorization raised some security concerns. Therefore, the Local Security Office (LSO) asked Individual to clarify some issues at a Personnel Security Interview (PSI) held in August 2004. During the PSI, the Individual admitted that he smoked marijuana, ingested LSD and mushrooms, and used cocaine between 1990 and 2002. The Individual further stated that he smoked marijuana on one occasion in 2002 while he was employed by DOE, even though he knew DOE has a zero tolerance policy regarding the use of illegal drugs. As a result of the information gathered at the PSI, the Individual was referred to the DOE consulting psychiatrist (DOE Psychiatrist) for evaluation. After interviewing the Individual and reviewing his Personnel Security File, the DOE Psychiatrist wrote an evaluative report describing his findings.^{3/} In his report, the DOE Psychiatrist determined that the Individual was reformed from his use of illegal drugs. However, he opined that the Individual has been and currently is a user

^{1/} 10 C.F.R. Part 710, Subpart A.

^{2/} 10 C.F.R. § 710.5(a).

^{3/} DOE Exhibit (DOE Ex.) 7.

of alcohol habitually to excess and is alcohol dependent.^{4/} The DOE Psychiatrist also stated that the Individual has an illness which causes or may cause, a significant defect in his judgment or reliability.^{5/}

The LSO issued a Notification Letter to the Individual, citing the Individual's drug use and the DOE Psychiatrist's diagnosis and report as creating a security concern under Criteria H,^{6/} J,^{7/} K^{8/} and L.^{9/} Criterion H refers to information indicating that an individual has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability."^{10/} Criterion J refers to information indicating that an individual has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse."^{11/} Criterion K refers to information indicating that an individual has

Trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.^{12/}

Criterion L refers to information indicating that an individual has

Engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to

^{4/} *Id.* at 21.

^{5/} *Id.*

^{6/} 10 C.F.R. § 710.8(h).

^{7/} *Id.* at § 710.8(j).

^{8/} *Id.* at § 710.8(k).

^{9/} *Id.* at § 710.8(l).

^{10/} *Id.* at § 710.8(h).

^{11/} *Id.* at § 710.8(j).

^{12/} *Id.* at § 710.8(k).

pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility^{13/}

Upon receipt of the Notification Letter, the Individual requested a hearing. The OHA Director appointed me as the Hearing Officer in this case.^{14/} I convened a hearing in this matter.^{15/}

At the hearing, the Individual was represented by an attorney. The Individual testified on his own behalf and also offered the testimony of a friend, a co-worker, his research advisor, a previous supervisor, his wife, and two doctors. The Local Security Office offered the testimony of the DOE Psychiatrist. The local DOE Office entered 11 exhibits into the record. The Individual entered five exhibits into the record. Below is a summary of the testimony presented at the hearing.

II. *Hearing Testimony*

A. The DOE Psychiatrist

1. Alcohol Use

The DOE Psychiatrist testified that he spent about two and a quarter hours with the Individual. Hearing Transcript (Tr.) at 16. After reviewing the Individual's file and meeting with the Individual, the DOE Psychiatrist stated that he diagnosed the Individual as alcohol dependent.^{16/} Tr. at 20. He believed that the Individual met the alcohol dependence criteria between 1994 and 1995, while the Individual was in college. Tr. at 20-21. The DOE Psychiatrist stated that the Individual's alcohol dependence was in sustained full remission, because he did not meet any of the criteria for alcohol dependence or abuse in the last 12 months. Tr. at 21.

^{13/} *Id.* at § 710.8(l).

^{14/} 10 C.F.R. § 710.25(a), (b).

^{15/} 10 C.F.R. § 710.25(g).

^{16/} The DOE Psychiatrist found that the Individual met four criteria outlined in *The Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition Textual Revisions* (DSM-IV TR) for alcohol dependence.

The DOE Psychiatrist outlined the four DSM-IV TR criteria on which he based his diagnosis of alcohol dependence. Tr. at 21. He stated that in 1994 and 1995, the Individual's tolerance for alcohol increased. *Id.* Therefore, he met criterion 1 of the DSM-IV TR. *Id.* Next, the Individual was drinking more than he intended to drink, indicating that he had problems with controlling his alcohol consumption and meeting criterion 3. *Id.* Also, the DOE Psychiatrist found that the Individual was spending a lot of time consuming alcohol. *Id.* This met criterion 5 of the DSM-IV TR. *Id.* Finally, he determined that the Individual's alcohol consumption was interfering with his schoolwork. Tr. at 22. Such interference met criterion 6 of the DSM-IV TR. *Id.* He also indicated that once an Individual is diagnosed with alcohol dependence, the diagnosis remains with the person for his lifetime. Tr. at 23. Therefore, he testified that a person who has been diagnosed with alcohol dependence should not ever consume alcohol. Tr. at 24.

The DOE Psychiatrist testified that he also found in his report that the Individual is currently consuming alcohol habitually to excess. Tr. at 22. He testified that drinking habitually to excess is not a diagnosis under the DSM-IV TR. Tr. at 25-26. Rather, it is his medical opinion. Tr. at 26. The DOE Psychiatrist stated that if a person has been intoxicated four or more times in one year he believes that person is using alcohol habitually to excess. *Id.* He found evidence that the Individual had been intoxicated at least every two months in the year prior to the interview. *Id.* The DOE Psychiatrist testified that an individual diagnosed as alcohol dependent who continues to consume alcohol cannot be considered reformed or rehabilitated. Tr. at 30.

2. Illegal Drug Use

The DOE Psychiatrist testified he believed the Individual has demonstrated adequate evidence of rehabilitation or reformation regarding his use of marijuana. Tr. at 42. He stated that the Individual met the criteria for marijuana abuse in the mid-1990's, but did not currently meet the criteria. Tr. at 40. He also opined that the Individual had been a user of marijuana habitually to excess in the past. Tr. at 41.

B. The Individual's Friend

The Individual's friend testified that she had known the Individual since August 2001 when her husband introduced them. Tr. at 63. The friend testified that she is a Licensed Independent Social Worker (LISW). Tr. at 64. She has dealt with individuals with alcohol problems. *Id.* In a prior employment, she needed to be alert to alcohol issues. *Id.* The friend stated that there are "red flags" to indicate that a person is drinking excessively. Tr. at 76. She has never noticed an alcohol problem with the Individual. Tr. at 76. She does not believe that the Individual has any alcohol problems. Tr. at 65.

She and her husband socialize with the Individual and his wife at least once a week. Tr. at 65. Often alcohol is consumed while they are socializing. Tr. at 66. She stated that the

Individual usually drinks no more than two to three drinks. *Id.* She testified about a wine festival they attended. Tr. at 67. They were at the wine festival for approximately three or four hours. *Id.* They walked and ate lunch at the festival. *Id.* The Individual visited about 10 to 12 stands to taste wine. Tr. at 69. Each stand would offer approximately a one-ounce sample of its wine. *Id.* She did not notice that the wine affected the Individual in any way. Tr. at 70. He did not appear to have trouble walking or speaking. *Id.* She has never seen the Individual impaired or intoxicated. *Id.*

C. The Individual's Co-Worker

A friend of the Individual who is also a co-worker testified that he has known the Individual approximately two years. Tr. at 81. He sees the Individual at work about once a week. *Id.* Socially, he goes to dinner occasionally with the Individual and his wife. Tr. at 82. They get together about every two months. *Id.* During the dinner occasions, he has seen the Individual consume two drinks over a three to four hour period. Tr. at 83.

The Individual and the co-worker also play golf together about twice a month during the golf season. Tr. at 83. He has never seen the Individual drink during golf matches. Tr. at 82. Rarely, they will have a beer after the golf match. Tr. at 83. He has never seen the Individual intoxicated on these occasions. *Id.* The most alcohol the friend has seen the Individual consume was at a wine festival. Tr. at 85. While they were there three to four hours, he believes the Individual consumed between three or four glasses of wine. Tr. at 86. They did eat lunch at the festival. *Id.* He has never seen the Individual intoxicated. Tr. at 88.

D. The Individual's Previous Supervisor

The Individual's previous supervisor hired the Individual. Tr. at 92. Prior to hiring the Individual, the previous supervisor spoke to the Individual's academic advisor. Tr. at 93. He had a professional relationship with the advisor, so he trusted the advisor to give him an honest opinion of the Individual. Tr. at 94. The advisor was well respected and one of the foremost experts in his field of study. Tr. at 93. The previous supervisor was impressed with the advisor's recommendation of the Individual. Tr. at 94.

The previous supervisor was very impressed with the Individual's job performance. Tr. at 96. He testified that the Individual was always reliable. *Id.* He trusted the Individual to manage the group when he was not available. *Id.*

The previous supervisor indicated that he has socialized with the Individual. Tr. at 95. He hosted parties for his work group. Tr. at 97. He believed that the Individual would drink about one drink an hour. Tr. at 97. Although he had problems with people at his parties consuming too much alcohol, the Individual was never one of those people. *Id.* He has never seen the Individual intoxicated. Tr. at 97-98.

They also play golf about once a month. Tr. at 99. Occasionally, they have a beer after the golf round. Tr. at 100. He has never seen the Individual intoxicated at any time. Tr. at 97-98.

E. The Individual's Research Advisor

The research advisor testified that he had known the Individual since 1994. Tr. at 105. He stated that he originally met the Individual when the Individual was a teaching assistant in the chemistry laboratory. Tr. at 105-06. The Individual excelled at supervising the students in the laboratory. Tr. at 113. Approximately a year after he started at the university, the Individual joined a research group of a fellow professor. Tr. at 106. The research advisor collaborated with the group and when the Individual left that group, he asked the Individual to join his research group. *Id.* When the Individual was working for the professor, they spoke every day. Tr. at 107.

After he received his degree, the Individual joined his research advisor in another city. Tr. at 106. The research advisor was able to get the Individual a position with a second professor. *Id.* He stated that the Individual was the one graduate student at the previous university that he would have recommended to that professor. Tr. at 114. They spent time working together as well as socializing. Tr. at 106. The research advisor testified that they saw each other three to four times a week. Tr. at 107.

The research advisor indicated that when the Individual was his teaching assistant, they would get together at the end of the semester for lunch and a pool tournament with the other teaching assistants. Tr. at 109. When the Individual began doing research for him, they would go for drinks once or twice a week. *Id.* Sometimes they also had dinner. *Id.* They also attended conferences together. *Id.* He never saw the Individual intoxicated. Tr. at 110.

F. The Individual's Wife

Before the Individual and his wife started socializing on a regular basis, she had never seen the Individual intoxicated. Tr. at 120. During that period, the most she saw him consume was three drinks. *Id.* After they started dating, the most she saw the Individual consume was three beers or half a bottle of wine. Tr. at 121. His wife testified that the Individual had at the most ten tastings at the wine festival. Tr. at 124. They did eat during the wine festival. Tr. at 125. She testified that the Individual currently drinks maybe one or two drinks a week. *Id.* It is a rare occasion if he drinks three drinks in one night. Tr. at 127. She disagreed with the DOE Psychiatrist's report that her husband drinks habitually to excess. Tr. at 136.

G. The Individual's Psychiatrist

The Individual's Psychiatrist testified that he used to be a DOE consulting psychiatrist. Tr. at 140-41. He met with the Individual about a week prior to the hearing. Tr. at 143. He interviewed the Individual for approximately two and a quarter hours. *Id.* The Individual's Psychiatrist testified that the Individual did not meet the criteria for a diagnosis of alcohol dependence and he did not have any typical indications of alcohol abuse or dependence such as alcohol-related arrests, blackouts, other persons complaining about his consumption of alcohol, or withdrawal symptoms. Tr. at 145. The Individual's Psychiatrist reviewed each of the criteria for alcohol dependence and did not believe that any of the criteria applied to the Individual, with possibly the exception of alcohol being consumed in larger amounts than intended. Tr. at 146-47. The Individual's Psychiatrist did indicate that there was a short period of time when he may have been drinking to excess and he thought there might have been alcohol abuse in the mid-1990s. Tr. at 145.

The Individual's Psychiatrist also testified that he did not agree with the DOE Psychiatrist's assessment that the Individual is currently using alcohol habitually to excess. Tr. at 149. He met with the Individual about one week before the hearing. Tr. at 143. The Individual's Psychiatrist did not believe anyone was complaining about his consumption of alcohol. *Id.* Based on what he heard at the hearing, the Individual's Psychiatrist believes the Individual has not been excessive in his use of alcohol in recent years. Tr. at 150.

H. The Individual's Medical-Legal Consultant

The Individual's medical-legal consultant testified that he reviewed the DOE Psychiatrist's report, with special attention to the laboratory reports. Tr. at 166. Based upon the laboratory tests performed by the DOE Psychiatrist and considering the possibility that both psychiatrists might be correct, the medical-legal consultant found that there was a ten percent chance that the Individual was drinking excessively. Tr. at 181. He stated that based on the tests, statistics, and medical literature, there is a 95 percent certainty that the Individual is not drinking excessively. Tr. at 184-86.

J. The Individual

At the hearing, the Individual testified that he disagreed with the factual information in the DOE Psychiatrist's report. Tr. at 223. Initially, he stated that he expected to be questioned about his illegal drug use. Tr. at 224, 253. He stated that he did use marijuana once while he was working for DOE,^{17/} but prior to holding an access authorization. Tr. at 225. When

^{17/} At the PSI, the Individual indicated that his last drug use was August 2002, over a year after he began working at DOE. At the hearing, the Individual stated that his last drug use was actually

he used marijuana while working at DOE, he was aware of the DOE drug policy. Tr. at 226. He indicated that he has no interest in using illegal drugs again, whether he is granted his security clearance or not. *Id.*

The Individual denied making a number of the statements that are attributed to him in the report. Tr. at 228-232. As to his alcohol consumption, the Individual stated that the DOE Psychiatrist told him that one of the tests he was ordering performed would indicate the number of grams of alcohol that the Individual had consumed in the seven to ten days prior to the interview. Tr. at 231. The Individual interpreted this to mean that the test would indicate the number of drinks that he had consumed each and every day. *Id.* The DOE Psychiatrist stated that if he were not honest about his alcohol consumption, the test would provide accurate information, which would be sufficient reason to deny the access authorization. *Id.* The Individual then stated that since he did not want to be accused of lying about the amount of drinks he had consumed, he exaggerated the number of drinks he had. Tr. at 232.

The Individual disputed the statement in the DOE Psychiatrist's report that he gets intoxicated once every two months. Tr. at 234. He testified that the last time he was intoxicated was at his wife's graduation party in May 2002. *Id.* He did not drive at the time because the party was at his in-law's house, where they were staying. *Id.* According to the DOE Psychiatrist's report, the Individual defined being intoxicated as "muscles relax, things not as clear, decreased coordination in hands, stumbling, slurred speech but it sounds fine to me." DOE Ex. 7 at 11. At the hearing, the Individual stated that he has never lost mental control because he was intoxicated. Tr. at 235. He disputed that he told the DOE Psychiatrist that he and his roommate had consumed a two-and-a-half liter bottle of whiskey in one night. Tr. at 237. He stated that he and his roommate had a party and the bottle of whiskey was for the party. Tr. at 238. By the next morning, the bottle was empty. *Id.*

As to his current alcohol consumption, the Individual testified that he may have a glass of wine or a beer when he is out dining with his wife. Tr. at 241. Occasionally when they are at home, they will sit on the patio. *Id.* At that time, he may start a beer but often, he does not finish it. *Id.* If they go out with friends, he may have a drink or two. *Id.* He indicated that his alcohol consumption has been consistent for the last three to five years. Tr. at 242. He indicated that possibly once a year he may consume more alcohol. *Id.* One instance would be the wine festival that had been mentioned previously. Tr. at 243. In discussing that incident, he testified that he believed both the DOE Psychiatrist and he were confused

August 2001, two months after he started working at DOE. For purposes of this Decision, the actual date is not critical. It is uncontested that the marijuana use occurred after he was hired by the DOE but before he had a security clearance.

about what constituted a drink. Tr. at 245, 251. He intends to continue moderate consumption of alcohol. *Id.*

III. Standard of Review

Under Part 710, DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility."^{18/} After a question concerning an individual's eligibility for an access authorization has been properly raised, the burden shifts to the individual who must come forward with convincing factual evidence that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest."^{19/}

In considering the question of the Individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in the regulations: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the Individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors.^{20/} After consideration of all the relevant information in the record, I conclude that a significant security concern was raised by the derogatory information. However, for the reasons discussed below, it is my decision that the Individual's access authorization should be restored.

IV. Findings and Conclusions

A. Criteria K and L

With regard to Criterion K, the Individual admitted that he used marijuana numerous times, the last time while he was employed by the DOE. He also admitted that he used LSD, cocaine, and mushrooms, prior to his employment with the DOE. The Individual acknowledged that he knew the drugs were illegal. Further, he knew that DOE has a zero

^{18/} 10 C.F.R. § 710.10(a).

^{19/} See 10 C.F.R. § 710.27(a).

^{20/} 10 C.F.R. § 710.7(c).

tolerance drug policy, but he chose to use marijuana anyway. Therefore, I believe the LSO properly raised both Criteria K and L.

I believe that the Individual has mitigated the concern regarding Criterion K. Most of his illegal drug usage occurred during his college years over ten years ago. With regard to the Individual's more recent use of marijuana, the DOE Psychiatrist opined that the Individual showed adequate evidence of rehabilitation or reformation regarding his use of marijuana. He has not used marijuana since August 2002. He self-reported his drug usage. The last usage was three years prior to the date of the hearing. At the time, he used marijuana on one occasion and was not holding an access authorization. The Individual has clearly committed not to use marijuana in the future. I believe that the Individual is sincere when he states that he will not use illegal drugs again. I also believe he is sincere when he says that he has not used them since his last reported use. Because the Individual's use of marijuana led to the Criteria L concern and he is no longer using marijuana, I do not believe he is presently engaged in unusual conduct or is subject to coercion. Therefore, the Individual has mitigated the concerns raised under Criterion K and L.

B. Criteria H and J

With regard to Criteria H and J, the LSO raised these concerns based on the DOE Psychiatrist's report. The DOE Psychiatrist testified that the Individual was alcohol dependent in sustained full remission and is currently consuming alcohol habitually in excess. The diagnosis of alcohol dependence is based on the Individual's behavior between 1994 and 1995 when the Individual was attending college. That period was more than ten years ago when the Individual was at a young age, and the Individual has shown no signs of alcohol dependence since that time. Under these circumstances, I can attach little weight to the DOE Psychiatrist's diagnosis. Instead, I find more persuasive the opinion of the Individual's Psychiatrist that the Individual should not have been diagnosed as alcohol dependent.

However, the finding by the DOE Psychiatrist that the Individual is currently consuming alcohol to excess is clearly a security concern. I believe that the testimony at the hearing indicates that the Individual has not recently consumed alcohol to excess. The Individual's Psychiatrist testified that the Individual was not using alcohol habitually to excess. The Individual testified that the last time he had been intoxicated was the night of his wife's graduation, over two years prior to the interview and three years prior to the hearing. The medical-legal consultant testified that there was a 95 percent possibility that the Individual was not consuming alcohol excessively. The Individual's friend, co-worker, research advisor, previous supervisor, and wife testified that the Individual did not overindulge in alcohol. The friend, co-worker, research advisor, and previous supervisor all testified that they had never seen the Individual intoxicated. They all testified that he usually consumed

no more than one drink an hour. They had never seen him consume more than three drinks in one night. All these witnesses had opportunities to view the Individual in social situations. The evidence weighs overwhelmingly in the Individual's favor as to his alcohol use. I am convinced that the Individual is not currently consuming alcohol habitually to excess. Therefore, I find that the evidence and testimony presented by the Individual overcame the security concerns raised under Criteria H and J.

V. Conclusion

Upon consideration of the record in this case, I find the LSO properly raised the concerns regarding Criteria K and L but that those security concerns have been sufficiently mitigated. Further, I find that the alcohol-related security concerns raised under Criteria H and J are insubstantial and not supported by the record in this case. Therefore, I conclude that granting the Individual's access authorization would not endanger the common defense and security and would not be clearly inconsistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should be granted. The Manager of the LSO or the Office of Security may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: February 12, 2007